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BEFORE THE
POSTAL REGULATORY COMMISSION

Competitive Product Prices Parcel Select Parcel Select Contract 44	Docket No. MC2021-42
Competitive Product Prices Parcel Select Contract 44 (MC2021-42) Negotiated Service Agreement	Docket No. CP2021-43

OPPOSITION OF AMAZON.COM SERVICES LLC TO MOTION OF STRATEGIC ORGANIZING CENTER FOR LEAVE TO FILE RESPONSE
(September 9, 2022)

Amazon.com Services LLC ("ASL") respectfully submits this opposition to the September 2 "Motion of Strategic Organizing Center Requesting Leave to Reply to Responses Opposing SOC's Motion for Access to Non-Public Materials Under Protective Conditions" (the "Motion"), and the related "Proposed Reply of Strategic Organizing Center to Responses in Opposition to SOC Request for Access to Non-Public Materials Under Protective Conditions" (the "Reply"). The pleadings follow a pattern of unauthorized and duplicative filings by SOC in this matter. The Commission's rules of practice do not authorize a party seeking access to non-public documents to file a reply to a response in opposition to access "[u]nless the Commission otherwise provides."[1] Neither the Motion nor the Reply offers any legitimate reason for granting an exception in this case.

SOC's three arguments in support of "good cause" for its unauthorized reply are all meritless. SOC first argues that its request for access is of "significant public interest," but this assertion is both circular and unavailing. Motion at 3. Every litigant believes its self-interest is also in the public interest, so this alone cannot be good cause to waive the rules. Nor would SOC's proposed reply

[1] 39 CFR § 3011.301(d).

comments aid the Commission in its decision-making process as they mainly recycle arguments SOC has made in multiple prior filings.[2]

Second, SOC argues that the arguments in opposition to its motion for access are tantamount to facial challenges to the legitimacy of the rules, thus converting its motion in an adjudicative docket to the "functional equivalent" of an informal rulemaking. Motion at 3. SOC cites no legal authority for this argument because there is none—an adjudication is not a rulemaking under the Administrative Procedure Act.[3] The argument is also an obvious distortion of the arguments it purports to address as no party is challenging the "legitimacy" of the Commission's rules or the Commission's authority. Rather, the arguments in opposition to SOC's motion flow from the recognition that SOC is attempting to use a legitimate rule for access to non-public information in a manner for which the rule was never intended—the illegitimate purpose of conducting pre-litigation discovery.

SOC's final argument that "good cause" exists on the grounds that SOC "has not yet had the opportunity to respond" to the opposition arguments, *id*., at 3, is—like its first—far too broad to be a useful guide to decision. It would, if sufficient, apply to virtually every case, effectively reading the limitation of 39 CFR 3011.301(d) out of the rules. This would especially be the case where, as here, a party chooses to file a motion with no basis or support, and then seeks to pile extensive argumentation into an unauthorized reply.

The arguments on the merits that SOC attempts to present in its rambling 17 page proposed reply fare no better. SOC's primary argument is that the Commission's access rules "plainly permit access to non-public materials in aid of initiation of a complaint[.]" Reply at 4. But SOC's argument does not and cannot rely on the "plain language" of 39 CFR 3011.300(c) or 39 CFR

[2] *See* Docket No. MC2021-78, Order No. 6105 at 9-10 (denying motion for leave to file reply comments (the "continuation of the parties' underlying dispute in successive filings does not aid the Commission's decision-making process.")).

[3] *See, e.g., Home Box Office v. FCC*, 567 F.2d 9, 43 n.74, 57 (D.C. Cir. 1977)(distinguishing the two for the purposes of application of ex parte rules and of the evidence needed to support factual findings, and noting for example that a Presidential finding is "clearly not adjudication, nor even quasi-judicial.").

3011.301(b)(2)(ii) because neither rule so much as mentions complaints. SOC's "plain language" argument thus devolves into the argument that because the access rules do not expressly foreclose their use for purposes of pre-litigation discovery, it must be allowed. SOC has not identified any case law to support this proposition. Indeed, courts have readily disposed of the fallacious argument that anything not expressly forbidden in a statute or rule must be allowed.[4]

Moreover, as ASL explained in detail in its prior submission, SOC's argument on this point ignores and misconstrues the regulatory history of the changes to the access rules. This history confirms that the changes to Rules 3011.300 and 3011.301 were intended to be technical enhancements to the then-existing rules, consistent with past practice, and not as a radical departure from the Commission's prior practice of regulating discovery. It is, therefore, not surprising that the regulatory history does not expressly foreclose use of the access rules for pre-litigation discovery. It does not mention such discovery at all because Rule 3011.301 was never intended to be used for that purpose. SOC's reliance on the single mention of the word "complaint" in a footnote cataloging Commission docket designations undercuts rather than supports its position. Reply at 6. It is implausible that the Commission intended to communicate such a sweeping change through this footnote, without any discussion of that intent in the proposed rule or in the final rule adopting the revisions to its access rules, or any effort to conform this supposed broad new power to its existing complaint and discovery rules.

As ASL has also explained, SOC's "plain language" argument contradicts the statutory provisions governing rate and service complaints, which expressly condition "proceedings," including the taking of discovery, upon the Commission's affirmative finding that "such complaint raises

[4] *See, e.g., Railway Labor Executives' Ass'n v. National Mediation Bd*, 29 F.3d 655, 671 (D.C. Cir. 1994)("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.")(emphasis in original).

materials issues of fact or law."[5] The Commission's separate rules governing complaint proceedings likewise condition discovery on a finding that the complaint raises an issue of material fact or law.[6] SOC's Reply fails to deal with this obvious conflict, or with the absurd result under its view that the Commission would require such a finding in a complaint proceeding itself, but not with respect to an access request seeking to fish around to see if there were any basis for a complaint to begin with. Again, even if there were support for SOC's interpretation that Rules 3011.300 and 3011.301 were intended to encompass complaint proceedings (there is none), such an interpretation would impermissibly nullify the statutory limitations of section 3662(b)(1)(A)(i).

Unable to explain how its expansive interpretation of the access rules could be reconciled with the statutory and regulatory provisions governing complaint proceedings, SOC attempts to sidestep the issue with semantic detours into the meaning of the term "litigation." Reply at 7-8. Complaint proceedings with an opportunity for a hearing on the record under Subpart F of the Commission's general rules of practice are undeniably a form of administrative litigation.[7] SOC by its own admission is seeking to use the Commission's access rules to obtain non-public information to aid its preparation of a complaint. This is the very definition of pre-litigation discovery.

SOC's straw arguments regarding applicability of the Federal Rules of Civil Procedure are also wide of the mark. *Id*. at 8. No party is arguing the Commission is governed by the Federal Rules in all circumstances. However, the logical parallel between the statutory complaint provisions and the Commission's implementing regulations and the federal rules is inescapable—relevant and proportionate discovery necessarily follows a complainant's statement of a viable claim. It cannot logically precede it.

[5] 39 U.S.C. § 3662(b)(1)(A)(i).
[6] *See* 39 CFR §§ 3022.10(a)(5), 3022.30, 3010.300(a), 3010.310.
[7] See 39 CFR §§ 3010.300 *et seq*.

SOC's Reply confirms it cannot satisfy the standards of Rule 3011.301 because it cannot make a threshold showing to establish good cause to access the requested non-public materials. SOC's Reply effectively abandons its claims alleging violations of sections 101(b) and 101(e), effectively conceding that those claims necessarily fail as a matter of law because the Commission does not have "direct jurisdiction" to hear them. Reply at 12-13. SOC now argues, without any factual or legal support, that the "policy goals" of section 101 may inform its claim for alleged violations of section 403(c). *Id.* This argument must also be rejected, among other reasons because SOC has failed to allege a viable section 403(c) claim. SOC's arguments in support of such a purported claim—that if the Postal Service's administration of unspecified contractual provisions amounts to "undue preferencing" it could raise a claim under section 403(c)—are speculative and circular. *Id.*

The arguments presented in SOC's Reply are also inconsistent with its prior position. SOC now abandons its prior position seeking to justify access to non-public materials of extreme commercial sensitivity so that it can independently evaluate whether the contract contains any "facial" violations of title 39. Reply at 10. SOC now argues its alleged section 403(c) claim will be based on "USPS's actual administration" of the contract. *Id.* SOC states that it "has received reports from numerous Postal Service employees that preferencing is indeed occurring, information that was presumably unavailable to the Commission at the time it approved the Contract." *Id.*

SOC's revised and inconsistent claim should alone result in denial of the request for access. If SOC has evidence that the Postal Service is violating section 403(c), it can and should file a complaint setting forth the facts that it believes give rise to a violation of Title 39. If the activities are allegedly taking place independent of the contract approved by the Commission—"issues not previously considered or resolved by the Commission"—SOC has no need to obtain access to the unredacted contract. Nor is it sufficient justification to state that the terms of the contract may "incentivize" the Postal Service to violate section 403(c); either SOC has evidence that the Postal Service's actions violate section 403(c) or it does not. Having abandoned a "facial" challenge that would "second guess"

the Commission, the contract is irrelevant. In summary, even apart from the fallacy of SOC's position that it can use the access rules to obtain pre-litigation discovery, there can be no justification to grant SOC access to non-public information of extreme commercial sensitivity where, as here, it would not be needed for SOC to state what it now asserts to be its claim.

Finally, SOC's dismissive and unsupported comments attempting to minimize the potential commercial harm to the Postal Service, its commercial partners, other mailers and end customers are directly contradicted by the evidence presented by all of the relevant commercial parties who would be directly affected. SOC's argument appears to be based in large part on the contention that the Postal Service's competitive products business is not actually competing in a competitive environment for package delivery services. Reply at 11. This remarkable contention, made by a party that has little, if any, experience in Commission matters, is both unsupported and incorrect.

As ASL, PSA, and the Postal Service have explained previously, the contribution from the Postal Service's competitive package products business helps defray the cost of maintaining a nationwide delivery network necessary to meet the Postal Service's universal service obligation, including service to remote and rural customers who view affordable delivery services as a lifeline. Accordingly, the Commission must consider the longer-term consequences of a failure to apply its access rules rigorously. A permissive ruling in this case will signal to litigants and others that a new vehicle is available to circumvent established discovery and Freedom of Information Act processes. Such a development would only harm the Postal Service's competitive standing.

CONCLUSION

For the reasons stated above, the Motion does not offer good cause for consideration of the proposed unauthorized Reply; nor does the proposed Reply offer any new arguments that merit consideration by the Commission. The Commission should deny the Motion.

Respectfully submitted,

/s/

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